MEMORANDUM

TO: Secretary John A. Hughes
Delaware Department of Natural Resources and Environmental Control

FROM: Kenneth T. Kristl

DATE: January 10, 2005

RE: Crown Landing Project

This memorandum concerns the Liquified Natural Gas ("LNG") import facility proposed by Crown Landing LLC ("Crown Landing"), an affiliate of BP, p.l.c. (the "Crown Landing Facility"). I have prepared this memorandum for inclusion with public comment on Crown Landing's Request for Status Decision under the Coastal Zone Act submitted to you. In addition, I have prepared this memorandum in response to the December 7, 2004 memo by David S. Swayze and Michael W. Teichman of Parkowski, Guerke & Swayze, P.A. submitted to you by Crown Landing (the "December 7 Memo").

This matter presents a stark choice: either the Coastal Zone Act's express prohibition against bulk product transfer facilities is a meaningful legal protection against development in the coastal zone or it is meaningless. A careful analysis of the text of the Coastal Zone Act, 7 Del. C. § 7001 *et seq*., the governing regulations, case law and other sources reveals that the Crown Landing Facility is a bulk product transfer facility. Despite the December 7 Memo's fundamentally flawed analysis, the "single industrial or manufacturing facility" exception in the Act's definition of bulk product transfer facility does not apply to Crown Landing. As such, the Facility is prohibited under the Act. Recognition that the Facility is permissible under the Act (as Crown Landing claims) would eviscerate the Act's express prohibition against bulk product transfer facilities by opening an exception so broad that there would be no room left for the rule itself, thereby rendering Delaware's coastal zone defenseless against any industry that has bulk items it wants to unload to and through one "facility" because there will be no principled way to invoke the prohibition in future matters. Such a result contradicts the express legislative intent behind the Act, and should therefore be rejected.

The Coastal Zone Act: Background and Purpose

A proper legal analysis of Crown Landing's Request for Status Decision must begin with the Coastal Zone Act itself. As the Delaware Supreme Court has made clear with respect to the Act, when applying the statute "the fundamental rule is to ascertain and give effect to the intent

of the legislature." *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242, 1246 (Del. 1985). In the Coastal Zone Act, the legislature made its intent very clear in the very first section of the Act:

> It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State. It is, therefore, the declared public policy of the State to control the location, extent and type of industrial development in Delaware's coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism. Specifically, this chapter seeks to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas . . . It is further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy. For these reasons, prohibition against bulk transfer facilities in the coastal zone is deemed imperative.

7 Del. C. § 7001. Thus, the express purpose of the Coastal Zone Act is to prevent two distinct and different types of activities in the coastal zone: heavy industry and bulk product transfer facilities not in operation as of June 28, 1971. The Act mandates that "no permits may be issued" for either of these prohibited activities. 7 Del. C. § 7003. The Regulations Governing Delaware's Coastal Zone prepared by the Delaware Department of Natural Resources and Environmental Control for the Coastal Zone Industrial Control Board on May 11, 1999 and set forth at Code Del. Regs. 7 100 101-1 through 101-13 ("the 1999 Regulations"),[1] emphasize this point by identifying uses or activities prohibited in the Coastal Zone to include "offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971" (Code Del. Regs. 7 100 101(4.3)),[2] "bulk product transfer facilities and pipelines which serve as bulk product transfer facilities that were not in operation on June 28, 1971" (*id*. at 4.5),[3] "the construction, establishment, or operation of offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971" (*id*. at 4.7),[4] and "individual pipelines or sets of pipelines which are not associated with a use that obtains a permit but which meet the definition of bulk product transfer facilities" (*id*. at 4.8).[5]

The Act defines "bulk product transfer facility" as

> Any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a

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[1] According to Weil Publishing Company, these regulations--originally set forth at Code Del. Regs. 70 600 002, were recodified to the 7 100 101 numbering with subsection numbering added. This memo will use the new numbering, and footnote the old numbering when necessary.

[2] Formerly Code Del. Regs. 70 600 002(D)(3).

[3] Formerly Code Del. Regs. 70 600 002(D)(5).

[4] Formerly Code Del. Regs. 70 600 002(D)(7).

[5] Formerly Code Del. Regs. 70 600 002(D)(8).

> nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

7 Del. C. § 7002(f). The 1999 Regulations define "bulk product" as "loose masses of cargo such as oil, grain, gas and minerals, which are typically stored in the hold of a vessel." Code Del. Regs. 7 100 101(3.0).[6] Based on the description of the Crown Landing Facility submitted with the Request for Status Decision, Crown Landing clearly intends to have a docking facility attached to the shore that will transfer bulk product LNG stored in the hold of tanker vessels to the onshore facility. The Crown Landing Facility clearly fits the literal terms of the first sentence of § 7002(f)'s definition of a bulk product transfer facility, and should fall under the absolute prohibition of § 7003. The issue in this matter, upon which the future viability of the Act's bulk product transfer facility prohibition depends, is whether the "Not included" language of the second sentence of §7002(f) applies to exempt the Crown Landing Facility from the Act's prohibition. Answering this question requires an interpretation of the Act.

Coastal Zone Act: Rules of Interpretation

The Delaware Supreme Court has articulated three rules that govern the interpretation of the Coastal Zone Act. The first is a rule requiring interpretations to harmonize the entire Act. As the court stated in *Coastal Barge*, "[a] statute is passed by the General Assembly as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce a harmonious whole." 492 A.2d at 1245. Thus, interpretations of the Act which merely focus on a single word or phrase while ignoring the rest of the Act (including the clear purpose articulated in § 7001) are improper.

The Delaware Supreme Court's second rule of interpretation is a rule of liberal construction. In *City of Wilmington v. Parcel of Land*, 607 A.2d 1163 (Del. 1992), the court stated:

> The Coastal Zone Act is an environmental protection measure designed to regulate closely the types of uses permitted and carried on in the area adjacent to the Delaware River, the Delaware Bay and the Atlantic Ocean. The legislative purpose of the Act is set forth in 7 Del. C. § 7001 … Given this broad statement of purpose and sweeping use of legislative authority, we conclude that the Act should be liberally construed in order to fully achieve the legislative goal of environmental protection.

607 A.2d at 1166. In *City of Wilmington*, discussed in more detail *infra*, the Court ruled that the valuation of an undeveloped parcel of land in a condemnation proceeding must take into consideration the fact that the Coastal Zone Act could apply because a hypothetical processing operation could be "manufacturing" under the Act. Thus, the rule of liberal construction under the Act requires that that one must err on the side of applying the restrictions and prohibitions of the Act because that best meets the legislative purpose set forth in § 7001. The corollary of this

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[6] Formerly Code Del. Regs. 70 600 002(C)(3).

rule is that exceptions in the Act must be defined narrowly in order to assure that the Act and its prohibitions have the maximum opportunity to assure that the environment is protected.[7]

The third rule of interpretation applicable to the Coastal Zone Act is a rule favoring interpretations with reasonable consequences over those with unreasonable consequences. In *Coastal Barge Corp.*, the Delaware Supreme Court found that the vessel-to-vessel transfer of coal in the Delaware River fell within the Coastal Zone Act's prohibition against bulk product transfer facilities even though the literal language of § 7002(f) required the transfer of bulk products "from vessel to onshore facility or vice versa." The *Coastal Barge* court determined that its analysis needed to be guided by what it called "the golden rule of statutory interpretation:"

> The golden rule of statutory interpretation to which we refer is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.

492 A.2d at 1247. The *Coastal Barge* court analyzed the purpose of the Act set forth in § 7001, with particular emphasis on the "prohibition against bulk product transfer facilities in the coastal zone is deemed imperative" language of that section. The Court held that, because the pollution potential from vessel to vessel transfers was the same as transfers from vessel to land, giving the "from vessel to onshore facility or vice versa" its literal meaning "would lead to the irrational and absurd result of prohibiting only those facilities for the transfer of substances from vessel to an onshore facility or vice versa, regardless of the potential threat of pollution and industrialization to the Delaware Coast." *Id*. The court therefore construed § 7002(f)'s "from vessel to onshore facility or vice versa" language to be merely "illustrative" of a bulk product transfer facility, and held that vessel to vessel transfers are also included within § 7002(f)'s definition. *Id*.

Coastal Barge highlights two important principles that are critical to the analysis of the Crown Landing's Request for Status Decision. First, fulfilling the purpose of the Act is important, and in applying the liberal construction principle it is appropriate to include within § 7002(f)'s ambit those things which are similar to and have the effect of a bulk product transfer facility even if the literal terms of the statute appears to exclude them. Second, interpretations of the Act that allow a frustration or diminishment of the purpose of the Act are irrational and absurd and must be rejected. Both of these principles lead inexorably to the conclusion that the Crown Landing Facility is a bulk product transfer facility prohibited under the Act.

Coastal Zone Act: Application of the Bulk Product Transfer Facility Prohibition to the Crown Landing Facility

As noted above, the Crown Landing Facility will involve the unloading of bulk LNG from vessels to an onshore facility, falling squarely within the terms of the first sentence of § 7002(f) so as to be a bulk product transfer facility subject to the prohibitions of the Act.

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[7] Given the explicit language and import of *City of Wilmington's* holding, the December 7 Memo's suggestion (Memo p. 5) that "liberal construction" requires an expansive reading of the term "manufacturing" in the "not included" exception of §7002(f)'s second sentence is simply wrong.

Knowing that the facility meets the literal terms of the definition for a bulk product transfer facility, the December 7 Memo argues that what it calls the "exclusion" of the second sentence of § 7002(f) applies here. However, careful reading of the Act itself and application of the three rules of interpretation outlined above shows that the "exclusion" does not apply, and the December 7 Memo's arguments are not well-taken.

1. The Only Directly-Applicable Precedent Found An LNG Facility Prohibited By The Act.

The Crown Landing Facility is not the first LNG facility proposed for the Delaware River. In December 1971, El Paso Eastern Company proposed building an LNG terminal in New Jersey opposite Claymont as only the fifth project under the Coastal Zone Act. According to the Delaware Coastal Zone Planning and Regulatory Administration's Report for the period June 28, 1971 - June 30, 1973,[8] the El Paso Project involved the importation of North African LNG by tanker, storage and regassification at the terminal, and shipment by pipeline to customers in the Northeast (a description identical in substance to the Crown Landing Facility). The State Planner sought then-Attorney General W. Laird Stabler, Jr.'s legal advice on the applicability of the Coastal Zone Act. The Report summarized Attorney General Stabler's response as follows:

> One January 20, 1972, the Attorney General advised that the pier would be a (prohibited) offshore bulk product transfer facility and that it was not exempt from prohibition by reason of the clause in Section 7002(f) of the Law providing for piers or docking facilities to be used solely by a single industrial or manufacturing user.

The Report attached Attorney General Stabler's January 20, 1972 letter. An examination of that letter reveals the Attorney General's succinct analysis of the issue:

> It is my opinion that the El Paso Eastern terminal does not fit within the "single industrial or manufacturing facility" exception. The Delaware courts have uniformly held that the meaning of a statute depends on the intent of the legislature and that such intent must be ascertained from an interpretation of the act as a whole. The facts contained in the letter from the El Paso Eastern Company indicate that the LNG terminal in question is merely a way station in the natural gas transportation system which El Paso Eastern is endeavoring to develop. It is quite clear that the legislative intent was to permit docking facilities where such facilities would benefit such industries as would be granted permits to operate in the Coastal Zone. Here the situation is reversed. The terminal will only exist as an adjunct to the docking facility. In other words, the important part of the project to El Paso Eastern is not the "industrial facility" but the docking facility.

As an initial matter, it is important to note how closely Attorney General Stabler's analysis tracks the three principles of Coastal Zone Act interpretation articulated by the Delaware Supreme Court (albeit at least 13 years before the Supreme Court first spoke on the

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[8] A copy of the relevant pages from this Report (including the January 20, 1972 letter from Attorney General Stabler referenced therein) is attached to this Memo as Attachment A.

matter). The analysis looks to the intent of the legislature and seeks to apply an interpretation that seeks to give meaning to all provisions of the Act as a whole. It applies a liberal interpretation of the bulk product transfer facility exception in order to carry out the intent of the legislature, and treats as illogical a position that is the "reverse" of what the legislature intended by the § 7002(f) second sentence exception. In short, Attorney General Stabler's analysis is consistent with the governing rules of Coastal Zone Act interpretation, and is therefore entitled to a great deal of precedential effect.

Attorney General Stabler's analysis is directly applicable to the Crown Landing Facility. The proposed docking facility for LNG tankers is the *sine qua non* of the Crown Landing project; without a dock for the tankers, the facility has no reason to exist. This contrasts with a facility that has multiple ways (by rail, truck, pipeline or on-site manufacture) to supply its operation with bulk product and simply seeks to use a dock to add an additional source of bulk product input. Indeed, the insight of Attorney General Stabler's analysis is that the creation of an onshore facility to support the bulk product transfer from a docking facility ignores the legislative intent (or "reverses" the situation) behind the Coastal Zone Act because it would create a loophole so large that it would render the bulk product transfer facility prohibition irrelevant. If all one needs is a facility on-shore for the "single industrial or manufacturing facility" exception to apply, it is difficult if not impossible to think of <u>any</u> type of docking facility that would not fall under the exception, thereby frustrating the express legislative purpose to prohibit bulk product transfer facilities. This is precisely the type of illogical and absurd result that the second rule of statutory interpretation from *Coastal Barge* prohibits. The more logical interpretation is that of Attorney General Stabler: a docking facility whose bulk LNG transfers is the primary reason for the project cannot qualify for the exception, and is therefore a prohibited bulk product transfer facility under the Coastal Zone Act.

Crown Landing knows that Attorney General Stabler's opinion creates a huge problem for its facility, and so the December 7 Memo spends nearly one of its seven pages trying to undermine the opinion with five irrelevant and/or legally insufficient arguments:

First, the December 7 Memo characterizes the opinion as "sparse" and "informal," though it never explains why that has any legal significance. Then, as now, an interpretation of § 7002(f) needed to be made. Attorney General Stabler articulated a clear interpretation that is consistent with the Act's purpose and avoids the illogical and absurd result of the loophole Crown Landing advocates here. The analysis is as applicable today as it was in 1972.

Second, the December 7 Memo tries to distinguish the Stabler opinion as being "based largely on the express assumption that the El Paso facility would not be the type of facility granted a permit under the statute." Memo at p. 6. That is a complete misreading of the Stabler opinion letter. It is clear that the primary thrust of the analysis is based on the nature of the LNG dock itself and how the dock is the primary reason for the facility. Stabler's statement in the next sentence after the quotation above that "[f]urther, I assume that the facility proposed . . . is not the type of 'single industrial or manufacturing facility' for which your office would grant a

permit" is merely an additional reason why the exception does not apply, not the basis for the analysis quoted above.[9]

Third, the December 7 Memo tries to distinguish Crown Landing from the El Paso proposal by focusing on Stabler's description of El Paso as being a mere "way station" in the natural gas distribution process. This is a complete red herring. There is no evidence that the El Paso proposal was different in any way from the Crown Landing Facility; indeed, the December 7 Memo itself admits that the El Paso plan is "strikingly similar to what Crown Landing has proposed" (Memo at p. 6). Stabler's analysis for El Paso is equally applicable to Crown Landing.

Fourth, the December 7 Memo claims that Stabler's opinion is not binding authority--an odd position since the December 7 Memo attempts to argue from analogy to other Coastal Zone Act situations. If analogous situations have any impact on the determination of how the Act applies here, then the El Paso situation is the best possible analogy because as the December 7 Memo admits it is "strikingly similar" to Crown Landing. In any event, as the Report attached as Attachment A to this Memo makes clear, El Paso Eastern sought a status decision, and the State Planner rendered such a decision, informing El Paso Eastern that the proposed LNG facility was prohibited under the Act. This "precedent" clearly rested on Stabler's opinion, and makes that opinion as "binding" as anything that can be brought to bear on Crown Landing's Request for Status Decision.

Finally, the December 7 Memo contends that the Stabler opinion is some how "eclipsed" by the 1999 Regulations. However, the statutory language Attorney General Stabler interpreted has not changed since 1972, and it is the statute that governs the applicability of § 7002(f)'s second sentence. Indeed, the 1999 Regulations do not change the definition of "bulk product transfer facility" from the Act. *See* Code Del. Regs. 7 100 101(3.0).[10] The December 7 Memo points to no language in the 1999 Regulations which change or undermine the basis for Attorney General Stabler's analysis. Of course, to the extent that the 1999 Regulations are claimed to be inconsistent with the statute, the statutory language must of necessity control, as that is the only valid expression of the legislature's intent.

In short, the 1972 opinion of Attorney General Stabler gives a very clear interpretation of the Coastal Zone Act for a LNG docking facility built in the Delaware River and connected to an on-shore facility in New Jersey. This most applicable and appropriate analogy clearly found that the single industrial or manufacturing facility exception in the second sentence of § 7002(f) does not apply, and that such a docking facility is a bulk product transfer facility prohibited under the Act. That analysis clearly applies to the Crown Landing Facility.

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[9] This is evident not only from Stabler's use of the word "further" at the beginning of the sentence, but also from the fact that it comes after the analysis quoted above. There is simply no textual basis for the claim that the analysis quoted above was based on this assumption.

[10] Formerly Code Del. Regs. 70 600 002(C).

2. The Logan/Keystone Cogeneration Example Does Not Provide Any Valid Legal Basis For Exempting The Crown Landing Facility From The Bulk Product Transfer Facility Prohibition.

The December 7 Memo makes much out of the supposed "precedent" of the Logan/Keystone electrical co-generation facility located in New Jersey near the site for the proposed Crown Landing facility. As the December 7 Memo describes it, Logan/Keystone is a 225 megawatt cogeneration facility fueled by pulverized coal that is off-loaded from a pier extending into Delaware waters that received a Coastal Zone Act permit. Memo at p. 3. According to the December 7 Memo, the Logan/Keystone "precedent" is directly applicable to Crown Landing and in effect shifts the focus of the Coastal Zone Act analysis from the docking facility to the on-shore facility such that, if the on-shore facility can be granted a permit, then the docking facility is magically "bootstrapped" into an exemption from the bulk product transfer facility prohibition.

There are numerous problems with the December 7 Memo's analysis. First and foremost, the Logan/Keystone facility is nothing like the Crown Landing Facility. By the December 7 Memo's own description, the pier at Logan/Keystone is used to offload pulverized coal which is (presumably) burned to generate electricity. The coal is not off-loaded and then sent out into the stream of commerce via pipelines or anything else; it is literally a raw material used to make (and completely consumed in the making of) electricity. In contrast, LNG will be off-loaded at Crown Landing to be passed on through to pipelines as natural gas. The much more analogous example is the El Paso Eastern project that was the subject of Attorney General Stabler's 1972 opinion. Thus drawing conclusions based on Logan/Keystone is simply inappropriate.

Second, the December 7 Memo's analysis is based on a level of abstraction from the Logan/Keystone situation that promotes illogical and absurd results. In effect, the December 7 Memo holds out Logan/Keystone as standing for the proposition that any pier which serves only one facility is outside the bulk product transfer facility prohibition. Such a rule, however, would render the prohibition completely irrelevant. All a developer would need do is say the on-shore facility is a "single" facility, and the Logan/Keystone "rule" knocks out the prohibition regardless of how big the pier is or how much bulk product the docking facility would transfer. Indeed, one is hard-pressed to imagine any on-shore facility that is not a "single" facility, and thus every imaginable project would be able to invoke this Logan/Keystone "rule." This interpretation violates the "golden rule of statutory interpretation" by creating the illogical and absurd result of a prohibition against bulk product transfer facilities not having any projects to which it would apply. Likewise, the notion that the Logan/Keystone "rule" would allow any single on-shore facility to exempt its pier from the bulk product storage facility prohibition runs completely against the liberal interpretation of the Coastal Zone Act that the Delaware Supreme Court requires. Quite simply, Crown Landing's Logan/Keystone "rule" advocated in the December 7 Memo is completely anathema to everything that the Coastal Zone Act stands for and the rules for interpreting it.

Third, the December 7 Memo's claim that the Logan/Keystone "precedent" somehow explains the 1999 Regulations and somehow alters the statutory requirements is irrelevant. There of course is no evidence that the 1999 Regulations were trying to impose the

Logan/Keystone "rule" on the Coastal Zone Act. Even if they were, the 1999 Regulations cannot amend the Act itself; only the legislature can. That Crown Landing is trying to create an amendment to the Act through bad regulatory interpretation instead of through the General Assembly is perhaps most evident in connection with the December 7 Memo's claim that the 1999 Regulations' description of permissible activities "does not require the docking facility to serve another facility 'for which a permit can be granted.'" Memo at p. 4 n. 8. The language of § 7002(f) is clear: "Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility *for which a permit is granted* or which is a nonconforming use" (emphasis added). This is further evidence that what Crown Landing seeks are interpretations that ignore the express language of the statute--interpretations which violate the basic rules of statutory interpretation that the Delaware Supreme Court has adopted and applied to the Coastal Zone Act itself.[11]

Finally, the December 7 Memo's attempt to "bootstrap" the docking facility into an exception from the bulk product transfer facility prohibition is improper statutory interpretation. In effect, Crown Landing is arguing for a rule which determines the status of a docking facility by looking at everything except the docking facility--no doubt because it knows, from Attorney General Stabler's opinion, that looking at an LNG docking facility itself directly implicates the prohibition. As the El Paso example makes clear, however, it is important to examine the docking facility itself. When a docking facility is the primary reason for the whole project, because it is the sole source of the bulk product that the on-shore facility is processing and passing on into the pipeline system, then the docking facility is in fact functioning as a bulk product transfer facility. The Coastal Zone Act is clear: such facilities are prohibited. Sleight of hand designed to avoid this clear prohibition is improper statutory interpretation, and should be rejected.

3. The Crown Landing Facility Will Not Be A Single Industrial Or Manufacturing Facility For Purposes Of The Second Sentence Of § 7002(f).

Even if one were to accept Crown Landing's illogical and absurd interpretations of the Coastal Zone Act, the Crown Landing Facility would not qualify for the exception in § 7002(f)'s second sentence.

The second sentence of § 7002(f)'s bulk product transfer facility definition states: " Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use." Crown Landing does not claim it is an "industrial facility;" instead, the December 7 Memo argues that the Crown Landing Facility is a single manufacturing facility under the second sentence. That argument is legally insufficient for several reasons.

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[11] Crown Landing's implied threat of a constitutional challenge based on the dormant commerce clause for adopting a different interpretation is irrelevant. The issue is not different treatment between New Jersey-based and Delaware-based facilities; an LNG terminal in Delaware would have exactly the same problems because it would be a prohibited bulk product transfer facility as well. Crown Landing's plan to build its on-shore facility in New Jersey could be interpreted as an implicit recognition that getting approval in Delaware would be difficult and a plan to get "backdoor" approval by using an on-shore facility out of Delaware's regulatory reach to bootstrap the docking facility into an exemption from the Act.

As with the other steps in this process, one must start with the language of the Coastal Zone Act itself. The Act defines "manufacturing" as follows:

> "Manufacturing" means the mechanical or chemical transformation of organic or inorganic substances into new products, characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided the new product is not a structure or other fixed improvement.

7 Del. C. § 7002(d). The Request for Status Decision makes clear that what will happen at the Crown Landing Facility is not "chemical transformation" because, in the Project Identification and Description section of the Request, Crown Landing specifically checked the "NO" box for the presence of "chemical processing equipment." *See* Request for Status Decision at p. 4. Instead, Crown Landing argues for a "mechanical transformation" based on three things: (1) that nitrogen is added to the LNG; (2) that the LNG is heated; and (3) that an odorant is added to the gas. The December 7 Memo contends that this is "transformation" because the LNG off the tanker is not ready for use by an end user and that "power driven machines" are involved in the process.

Crown Landing's position violates the rules of Coastal Zone Act interpretation because (once again) it creates an exception that swallows the rule. The Delaware Supreme Court has made clear that provisions of the Act must be interpreted in a manner that favors application of the prohibitions of the Act because that best insures fulfilling the legislative intent to prevent pollution and development in the coastal zone. Crown Landing's view of § 7002(f)'s second sentence, however, allows anyone to build a bulk product transfer facility in the coastal zone so long as a "step" of "adding" something to the product (for example, slapping a label on or putting the bulk product in a bag) occurs with "power-driven machines." Indeed, it is difficult if not impossible to envision any circumstance in which a bulk product transfer facility would ever be prohibited under Crown Landing's interpretation, because all reasonable scenarios would involve an on-shore facility that has some pump, valve, piping or other machinery used in a multi-stepped process of getting the bulk product to the final user/customer. Such an overly-broad view of § 7002(f)'s second sentence flies directly in the face of the legislature's intent in the Coastal Zone Act and is an illogical and absurd result.

Crown Landing's attempts to argue from analogy in support of its view of "manufacturing" merely underscores the illogic and absurdity of its position. The December 7 Memo cites *City of Wilmington* for an example of "manufacturing." What the December 7 Memo fails to mention is that *City of Wilmington* is <u>not</u> a case about § 7002(f)'s second sentence–indeed, it is not under the Coastal Zone Act at all. *City of Wilmington* arose out of the City's condemnation of certain real property near the Port of Wilmington. The issue in the case was the value of the highest and best use of the property, with the city arguing for a lower value based on the land's use as an import-export facility. The owner argued for a higher value based in part on the presence of fluorspar tailings on the site, which would provide $700,000 of additional value if further processed plus $209,000 for salvage value of the fluorspar processing equipment. The owner's appraiser assumed that the Coastal Zone Act would not be an impediment to conducting fluorspar processing on the site in order to realize the value. The

Superior Court ultimately agreed with the appraiser's assumption, and the issue on appeal was whether the court erred in instructing the commissioners that, for valuation purposes, a fluorspar operation on the property would not be subject to the Coastal Zone Act. Thus, in *City of Wilmington*, there was no Request for Status decision pending, and no one was actually seeking to conduct the fluorspar processing operation.

The Delaware Supreme Court reversed. After quoting the language of § 7001 describing the purpose behind the Coastal Zone Act, the Court articulated its liberal construction rule "in order to fully achieve the legislative goal of environmental protection." 607 A.2d at 1166. In this context, "liberal construction" requires a bias towards inclusion within the scope of the Act so that the Act's provisions and prohibitions can be fully implemented (not exclusion from coverage of the Act as Crown Landing suggests). The Supreme Court then went on to find that the hypothetical fluorspar processing operation was subject to regulation under a "liberal" (i.e., inclusive) meaning of "manufacturing." The Court described the fluorspar operation as follows:

> The processing operation would entail the use of chemical reagents, earth moving equipment, and mechanical equipment to separate the saleable grade fluorspar from the impurities with which it is mixed in an ore-like state. Furthermore, once separation is complete, the resultant slurry must be disposed of safely. As a [owner's] official conceded at trial, "[n]obody wants to see this stuff [i.e., slurry] to come [sic] into the river." Far from being outside the scope of the Act, we believe such an operation is precisely the type of industrial use the General Assembly intended to regulate. It is a mechanical and chemical transformation of an inorganic substance (fluorspar tailings) into a new product (saleable grad fluorspar) through the use of "power-driven machines and materials handling equipment."

Id. at 1167.[12] The Court therefore found that the commissioners in the condemnation proceeding should be allowed to consider the impact of obtaining a Coastal Zone Act permit would have on the value of the property. *Id*.

The hypothetical fluorspar operation in *City of Wilmington* is vastly different from what Crown Landing claims will occur at the Crown Landing Facility. There are no ore-like materials, use of chemical reagents, use of earth-moving equipment, separation of impurities, or resulting waste slurries at Crown Landing. Thus, even if the definition of "manufacturing" used in *City of Wilmington* informs the issue of the meaning of § 7002(f)'s second sentence, it certainly does not make Crown Landing's operation "manufacturing."

The December 7 Memo's other two analogies--a fish processing operation in Lewes and a gaseous CO_2 operation in Claymont--do not further Crown Landing's argument. As an initial matter, the choice of these two examples is incongruous. The December 7 Memo cites them for the proposition that, when the input into and output from a process is the same, it is still a manufacturing use, but Crown Landing has taken the position that what comes into the Crown Landing Facility and what goes out is <u>not</u> the same (a position it must take in order to argue that

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[12] Note that the December 7 Memo's quotation from the case (Memo at p. 5) conveniently leaves off the first three sentences here--sentences which set forth the facts that clearly distinguish the hypothetical fluorspar operation from the Crown Landing Facility.

there is "transformation" going on to meet the statutory definition of manufacturing). If in fact what comes into and goes out of the Crown Landing Facility is the same, then Crown Landing is not engaged in "manufacturing" for purposes of § 7002(f) because there is no chemical or mechanical transformation going on. Second, there is nothing to suggest that the "manufacturing" at issue was "manufacturing" for purposes of § 7002(f)'s second sentence. These two analogies appear to relate to the completely separate prohibition in the Act against heavy industry. Thus, they add nothing to the bulk product transfer facility issue here. Third, it is difficult to see how these analogies provide any insight into how a facility receiving bulk product LNG solely through its docking facility and sending it into the pipeline system is not a bulk product transfer facility prohibited under the Act. Once again, Crown Landing's overly-broad position precludes any meaningful applicability for the bulk product transfer facility prohibition in direct contravention of the legislative purpose of the Coastal Zone Act. Compare Crown Landing's fish and CO_2 examples to the El Paso Eastern LNG example; El Paso Eastern is clearly the most analogous situation. Under El Paso Eastern, the result is clear: an LNG docking facility is a bulk product transfer facility prohibited under the Coastal Zone Act. A proper argument by best applicable analogy leads to the conclusion that the Crown Landing Facility is prohibited under the Act.

Further support for the conclusion that the Crown Landing Facility is not a manufacturing facility falling within the § 7002(f) exception can be found in the 1999 Regulations, which describe the following as a permissible use and activity under the Act:

> The construction of pipelines or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. To be permissible under these regulations, the materials transferred through the pipeline or docking facilities must be used as a raw material in the manufacture of other products, or must be finished products being transported for delivery.

Code Del. Regs. 7 100 101(6.1).[13] This regulatory attempt to restate the exception of § 7002(f)'s second sentence is of course controlled by the language of the statute and the rules of interpretation applicable to the statute. In other words, this language must be read in a manner which produces a harmonious whole with the rest of the Coastal Zone Act, must be liberally construed (in the sense that the reading seeks to include things within the restrictions and prohibitions of the Act in a way which promotes the legislative intent to prohibit bulk product transfer facilities), and must be interpreted so as to avoid illogical and absurd results that are inconsistent with the intent of the Act.

The key to this regulatory language is that the bulk product materials being transferred to the on-shore facility must be "raw material in the manufacture of other products." In the Logan/Keystone situation discussed above, for example, pulverized coal was used to generate electricity. The coal was consumed in the process as a "raw material" and the end product--electricity--was completely different in nature and kind from the coal. The Crown Landing Facility, by contrast, does not use the LNG as a "raw material" processed to make another product completely different in nature and kind from the LNG. Instead, LNG <u>is</u> natural gas. All the Crown Landing Facility does is dilute it to a lower heating range (by adding nitrogen),

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[13] Formerly Code Del. Regs. 70 600 002(F)(1).

change its phase (from liquid to gas by heating it up), and add an odorant. The notion (apparently being advanced by Crown Landing here) that something is a "raw material" and that other products are being "manufactured" whenever the bulk material coming off the vessel is not "ready for use by the end user," Memo at p. 4, once again posits an exception that swallows the rule. No bulk product coming off the ship is "ready for use" by an "end user" if for no other reason than that the end user cannot use millions of gallons or hundreds of tons of bulk product at once. If mere packaging or final preparation sweeps bulk product transfer facilities into the regulatory exception, then there is little if anything that the Act's prohibition of bulk product transfer facilities can ever reach--an illogical and absurd result that flies in the face of the express language and legislative intent of the Act. Under any reasonable analysis of the language under the Delaware Supreme Court's rules of interpretation, LNG is not "raw material" and the Crown Landing Facility is not using LNG to "manufacture other products" so as to be able to invoke the permissible use language of Code Del. Regs. 7 100 101 (6.1). Thus, the prohibitions against bulk product transfer facilities cited numerous times in the 1999 Regulations bars the Crown Landing Facility here.

Coastal Zone Act: Application of the Heavy Industry Prohibition to the Crown Landing Facility

A separate and totally independent inquiry is whether the Crown Landing Facility is "heavy industry" under the Coastal Zone Act. As noted above, the prohibitions in the Act against heavy industry and bulk product transfer facilities are treated as completely separate from each other. See 7 Del. C. §§ 7001, 7003. Thus, a bulk product transfer facility is prohibited regardless of whether the on-shore facility associated with it is considered "heavy industry" under the Act. Given that the Crown Landing Facility is clearly a bulk product transfer facility prohibited under the Act, the issue of whether it is also "heavy industry" is irrelevant to the status decision sought here. Nevertheless, the December 7 Memo argues that the Crown Landing Facility is not heavy industry, and a brief response is appropriate here.

As with the bulk product transfer facility prohibition, the heavy industry analysis must start with the language of the Act itself. The legislative intent is clear, as § 7001 states "this chapter seeks to prohibit entirely the construction of new heavy industry in [Delaware's] coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas." The Act then defines "heavy industry use" in the following pertinent way:

> "Heavy industry use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes . . . Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry

> and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communication buildings, helipads, parking space and other service or supply structures required for the transfer of materials or workers in support of off-shore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.

7 Del. C. § 7002(e). The December 7 Memo apparently views the first part of this definition as a kind of "checklist" such that the failure to have a "majority" of the items in the list means that the facility is not "heavy industry." Memo at p. 7. Such a misreading of the Act cannot withstand close analysis.

It is obvious from a fair reading of § 7002(e) that the legislature was trying to create an expansive definition to cover all possible forms of "heavy industry" and not some "checklist" that creates a simple comparison test. Indeed, the very language of § 7002(e) belies the December 7 Memo's overly simplistic checklist approach. Far from being a definitive list, § 7002(e) makes clear that the smokestacks, tanks, and other listed items are "some but not necessarily all" of the equipment "characteristically employed" in a heavy industry use, and that the list includes "but [is] not limited to" the items specified. In other words, the presence of items on the list may indicate a heavy industry use, but the neither the presence nor absence of items is definitive. For this reason alone, the December 7 Memo's approach should be rejected.[14]

Further rejection of the checklist approach is found in the language of § 7002(e) itself. There, at the end of the equipment list, § 7002(e) sets forth a general test: does the facility "although conceivably operable without polluting the environment, ha[ve] the potential to pollute when equipment malfunctions or human error occurs"? For the Crown Landing Facility, the answer is unqualifiedly "YES" for two different reasons:

> *First*, while the <u>burning</u> of natural gas is a relatively clean event, a spill of LNG from an accident or terrorist attack would release uncombusted methane and other, heavier hydrocarbons[15] into the atmosphere, and such methane and gases would be air pollutants under the Clear Air Act. The December 7 Memo's potential to pollute analysis

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[14] The December 7 Memo's citation to the Superior Court's decision in *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649 (1973), does not salvage the checklist approach because *Kreshtool* rejects that approach and is easily distinguishable. In rejecting the checklist approach, Judge Quillen specifically found that the Coastal Zone Industrial Board "must" consider more than the physical characteristics of the facility--it must also consider the potential to pollute. 310 A.2d at 653. Second, *Kreshtool* arose after a full application for a Coastal Zone Act permit was reviewed by the State Planner and appealed through the Coastal Zone Industrial Board. Thus, a full record existed, including consideration of the six review factors set forth in 7 Del. C. § 7004. No such record exists here.

[15] Public Service Electric and Gas Company (PSEG) has submitted comments to the Federal Energy Regulatory Commission (FERC) in connection with Crown Landing's application for FERC approval of the Crown Landing facility. In those comments, PSEG points out that imported LNG can be quite different from domestic pipeline gas because heavier hydrocarbons like ethane, propane, and butane are not recovered as they are in domestic production. See Motion to Intervene, Comments and Protest of the PSEG Companies attached Affidavit of Peter J. Collette at p. 4, all attached as Attachment B to this memo. It appears that the presence of these heavier hydrocarbons (which burn "hotter" and thus increase the Btu output of the gas) is the reason why Crown Landing proposes to inject nitrogen into LNG to lower its heating value.

completely ignores this impact, focusing solely on water pollution and harm to aquatic plant and wildlife, Memo at p. 7 n. 17--further evidence of Crown Landing's attempts to create the illusion of compliance with the Act by selective and misleading analyses.

Second, a recent study by Sandia National Laboratories for the United States Department of Energy shows that a spill of LNG could create a giant fireball that would burn buildings and melt steel as much as 1975 feet away and cause burns to persons as much as 6949 feet (or 1.3 miles) away.[16] If (as Crown Landing claims) harm to aquatic plants and wildlife is a relevant measure of potential to pollute, then a more than one mile radius of incendiary destruction clearly satisfies that criteria.

Crown Landing cannot dismiss these facts by arguing that the probability of such an accident or terrorist attack is low because the language of § 7002(e) is clear that any malfunction or human error must be considered, not merely those with a certain level of probability. Quite simply, the Crown Landing Facility has the potential to create significant air pollution and widespread environmental destruction from a spill caused by equipment malfunction, human error, or terrorist attack. Under the potential to pollute test of § 7002(e), the Crown Landing Facility is clearly "heavy industry."

Finally, the December 7 Memo conveniently ignores the most revealing and damaging part of § 7002(e): the portion of the section describing "[g]eneric examples of uses not included in the definition of 'heavy industry.'" In fact, this is the only place where the Act actually requires looking at the on-shore portion of a facility--precisely what the December 7 Memo advocates in its dissection of the Crown Landing Facility into a "Docking Facility" and a "Manufacturing Facility." In the description of these "generic examples," § 7002(e) specifically excludes on-shore facilities provided two conditions are met: (1) the on-shore facility is less than 20 acres in size; and (2) the "on-shore facilities shall not include tank farms or storage tanks." The Crown Landing Facility arguably fails to meet the first and certainly fails to meet the latter of these conditions, and thus does not fall under § 7002(e)'s stated description of a facility excluded from the definition of "heavy industry use." Consistent with the rule of statutory interpretation seeking to give effect to the intent of the legislature, the failure to meet the express exclusion from "heavy industry" is a much stronger indication of the Crown Landing Facility's status under the Act than December 7 Memo's "checklist" approach against a non-exhaustive, illustrative list of equipment.

Conclusion

A thorough analysis of the Crown Landing Request for Status Determination under the applicable Coastal Zone Act language, case law, and recognized principles of statutory construction all lead to the conclusion that the Crown Landing Facility is a bulk product transfer facility prohibited under the Act. Any other result requires the adoption of an interpretation of § 7002(f) that will ignore the express legislative purpose of the Act and render meaningless the

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[16] Hightower, et al., *Guidance On Risk Analysis And Safety Implications Of A Large Liquified Natural Gas (LNG) Spill Over Water* (Sandia Report #SAND2004-6258, printed December 2004) available at http://www.fe.doe.gov/programs/oilgas/storage/lng/sandia_lng_1204.pdf .

bulk product transfer facility prohibition. In light of the express language of the Coastal Zone Act and the clear legislative purpose behind it, the status decision must articulate how the decision comports with that language and how the bulk product transfer facility prohibition will apply after the decision is rendered. For the future vitality of the Coastal Zone Act, you should inform Crown Landing that the Crown Landing Facility is prohibited under the Act.